(18,896)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 262.

THE STATE OF OHIO ON THE RELATION OF JOHN LLOYD,

PLAINTIFF IN ERROR,

vs.

JOSEPH B. DOLLISON, SHERIFF OF GUERNSEY COUNTY, OHIO,

DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

Under the several assignments of error made by the plaintiff in error, he discusses but five principal propositions. The several assignments of error may, therefore, be grouped under these five principal propositions, as follows:

First: The act discriminates against the dealer in intoxicating liquors as a beverage by certain exceptions as to the manufacturer and the like, and thus abridges the privileges and immunities of plaintiff in error as guaranteed by the Four-

teenth Amendment to the Federal Constitution. (Assignments of error numbered 1, 2, 6, 7, 8, 10 and 11).

Second: "The Local Option" feature of the Act is attacked on the ground that the Act takes effect on some contingency. (Assignments of error numbered 9 and 11).

Third: The alleged failure to provide a lawful jury. (Assignments of error numbered 4 and 12).

Fourth: That the Act impairs the obligation of contracts. (Assignment of error numbered 5).

Fifth: That special privileges are extended to certain railroad corporations which are denied to other corporations and all natural persons, including the plaintiff in error. (Assignment of error numbered 10).

As to the State Constitution.

So far as the assignments of error in this case relate to any conflict between the Act and the Constitution of the State of Ohio, this court will follow the judgment of the State Court upon such point.

Gut vs. State, 9 Wallace, 35.
Rippey vs. State of Texas.
Decided by this court March 21, 1904.

Federal Constitution.

The question for this court is, therefore, "whether if the State Constitution undertakes to authorize such a law, it encounters the Constitution of the United States."

Discrimination against the Liquor Traffic.

All questions covered by the several assignments of error grouped under paragraph first above, on the allegation of discrimination against the dealer in intoxicating liquors as a beverage by certain exceptions as to the manufacturer and the

like, present no question which this court will consider. All such objections as are made under this heading, proceed on the mistaken theory that there is some inherent right in the citizen to engage in the sale of intoxicating liquors as a beverage, or at retail. This court has repeatedly held that such theory is entirely erroneous. that there is no right to engage in such traffic, that the states may prohibit such traffic at will, or may regulate it even though such regulations discriminate against the retail dealer.

In the case of Crowley vs. Christensen, 137 U. S., 86, this court said:

"By the general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors in this way has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may a license be exacted from the keeper of the saloon before a glass of his liquors can be thus disposed of, but restrictions may be imposed as to the class of persons to whom they may be sold, and the hours of the day, and the days of the week on which the saloons may be opened. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality, and not of federal law. The police power of the state is fully competent to regulate the business, to mitigate its evils, or to suppress it entirely. There is no inherent right in a citizen to sell intoxicating liquors by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority. That authority may vest in such officers as it may deem proper, the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter of legislative

will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not affect the authority of the state, or one which can be brought under the cognizance of the courts of the United States."

This holding is followed and approved in the case of Cronin vs. Adams, et al., decided by this court at the present term on January 4, 1904.

Bartemeyer vs. Iowa, 18 Wall., 129-133;
Vance vs. Vandercook Co., 170 U. S., 438-444.
Giozza vs. Tiernan, 148 U. S., 657, 661-62;
Slaughter House Cases, 16 Wall., 37.

Can a Valid Local Option Law be Passed.

The various assignments of error referred to under the second paragraph above, are those which attack the vital feature of any local option law. It seems to be the contention of the plaintiff in error that all Local Option Laws are invalid, and this is upon the theory that no law can be passed to take effect or come into force or action upon the happening of any contingency.

It is true that the legislature cannot delegate its authority to pass laws, but as Judge Agnew stated in Locke's Appeal, 72 Pa. St., 491.

> "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government."

The overwhelming preponderance of authority is to the effect that a local option law, if it is a complete enactment in itself, such as the one in this case, requiring nothing further to give validity and depending upon the popular vote for nothing but a determination of the territorial limits for its operation, is a valid and constitutional exercise of the legislative power.

The following are a few of the cases and authorities sustaining this doctrine.

Weil v. Calhoun, 25 Fed. Rep., 865; State v. Parker, 26 Vt., 27; Comm. v. Bennet, 108 Mass., 357; State v. Wilcox, 42 Conn., 364, 19 Am. Rep., 536; Gloversville v. Howell, 70 N. Y., 287; Locke's Appeal, 72 Pa. St., 491, 13 Am. Rep., 716; State v. Common Pleas of Morris Co., 36 N. J. Law, 72, 13 Am. Rep., 422; State v. Circuit Court, 50 N. J., 585, 15 Atl. Rep., 272; Hammond v. Haines, 25 Md., 541, 90 Am. Dec., 77; Fell v. State, 42 Md., 72; Savage v. Comm., 84 Va., 619, 5 S. E. Rep., 565; Caldwell v. Barnet, 73 Ga., 604; Schulherr v. Bordeaux, 64 Miss., 59, 8 South Rep., 201; Lemon v. Peyton, 64 Miss., 161; 8 South Rep., 235; Holley v. State, 14 Tex. App., 505; Ex parte Lynn, 19 Tex. App., 293; Anderson v. Commonwealth, 13 Bush, 485; State v. Pond, 93 Mo., 606; 6 S. W. Rep., 469; Feel v. Bloomingdale, 82 Mich., 393; 47 N. W. Rep., 37; Territory v. O'Connor, 5 Dak., 397; 41 N. Y. Rep., 746; State v. Cooke, 24 Minn., 31 Am. Rep., 344; Cooley on Const. Lim., 195; Boyd v. Bryant, 35 Ark., 69, 37 Am. Rep., 6; Blackwell v. State, 36 Ark., 178; Trammel v. Bradley, 37 Ark., 374.

Blanding v. Burr, 13 Cal., 343; Hobart v. Butte County, 17 Cal., 23; Robinson v. Bidwell, 22 Cal., 379; People v. Coon, 25 Cal., 635; People v. McFadden, 81 Cal., 489, 15 Am. Rep., 66.

Powers v. Dougherty County, 23 Ga., 65; Methias v. Jones, 84 Ga., 804; People v. Reynolds, 10 Ill., 1; People v. Salomon, 51 Ill., 37; Erlinger v. Boneau, 51 Ill., 94.

State v. Forkner, 94 Iowa, 733.

Comm. v. Weller, 14 Bush. (Ky.), 218, 29 Am. Rep., 407; Clarke v. Rogers, 81 Ky., 43.

Baltimore v. Clunet, 23 Md., 449.

Feek v. Bloomingdale Tp., 82 Mich., 393.

Schulhorr v. Bordeaux, 64 Miss., 59. See also Lemon v. Peyton, 64 Miss., 161.

St. Louis v. Alexander, 23 Mo., 483; Ex. p. Swann, 96 Mo., 44; State v. Moore, 107 Mo., 78; State v. Searcy, 111 Mo., 236; State v. Wingfield, 11 Mo., 428, 37 Am. St. Rep., 406; State v. Dugan, 110 Mo., 138; State v. Watts, 111 Mo., 553.

Grant v. Courtner, 84 Barb. (N. Y.), 232; Corning v. Greene, 23 Barb. (N. Y.), 33.

Manlly v. Raleigh, 4 Jones Eq. (57 N. Car.), 370; Cain v. Davie County, 86 N. Car., 8; 140 U. S. In re Rehrer, 60 Me., 356; 38 Minn., 281; 42 Conn., 583; 37 Ark., 374; Black on Intoxicating Liquor (Section 45).

Ohio—Cincinnati, etc., R. Co. v. Clinton County, 1 Ohio St., 77; Weaver v. Cherry, 8 Ohio St., 564; Gordon v. State, 46 O. St., 607; 61 O. S., 597; 63 O. S., 398.

The general holding of the authorities is against the proposition of the plaintiff in error whether applied to the liquor traffic or to other legislation, but we regard that question as settled so far as the traffic in intoxicating liquors is concerned, by the decision of this court upon the validity of the Local Option Law of the State of Texas, which was rendered in the case of Rippey vs. State of Texas, decided by this court on March 21, 1904.

Trial by Jury.

Under the assignments of error grouped under the third paragraph above, the plaintiff in error undertakes to show this court that he cannot have a lawful jury for the trial of a violation of the "Beal Law," so called. This assumption seems to be based upon the provision of the sixth amendment of Federal Constitution, which guarantees a "speedy and public trial by an impartial jury of the state and district wherein the crime

shall have been committed, which district shall have been previously ascertained by law."

This presents no question which this court will consider, for the Sixth Amendment is not a restriction upon the several states, but upon the Federal government.

In the case of Ilenbecker vs. Plymouth County, 143 U. S., 34, this court says:

"This is disposed of by the principle often decided by this court, that the first eight articles of the amendments to the Constitution have reference to powers exercised by the government of the United States, and not to those of the States."

But the plaintiff in error also claims that such failure to provide a lawful jury is in violation of the Fourteenth Amendment to the Federal Constitution. We are not certain that this question can be made by plaintiff in error under the Fourteenth Amendment, as it has been held by this court in the case of Walker vs. Sauvinet, 92 U. S., 90, that "A trial by jury in suits at common law pending in the state courts, is not a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment of the Constitution of the United States to abridge."

Further, we call the attention of the court to the fact that it does not appear from the record that the defendant has been denied a jury trial. It is time enough to try that question when proper demand shall have been made and denied. The presumption is that the officers of the state courts will do their duty, and that if the plaintiff in error is entitled to a jury, that he will be given it.

In the case of Eilenbecker vs. Plymouth County, 134 U. S., 40, this court says:

> "It does not appear from this record that the plaintiff in error has ever been refused a jury trial. When he has been refused it, it will be time for him to complain."

In view of the foregoing, we fail to see how any such question can be made by the plaintiff in error. If this court considers this question, we submit the following:

In the case of Twitchell vs. Commonwealth, 7 Wallace, 321, this court held:

> "That the fifth and sixth amendments of the Constitution of the United States (relating to criminal prosecutions) were not designed as limits upon the state governments in reference to their own citizens, but exclusively as restrictions upon federal power."

Citing 7 Peters, 243, and quoting 5 Howard, 434, the court said:

> "That this interpretation is the only rational and intelligible interpretation which these amendments can have."

Validity of Contracts.

In his assignment of error number 5, and noted under paragraph four above, counsel for the plaintiff in error alleges that the Act in question impairs the validity of contracts. We can find nothing in his brief applicable to this proposition, and we therefore assume that he has abandoned it, but even if this were not true, it is difficult to conceive how an Act of the Legislature of the State of Ohio, forbidding under certain conditions, the sale of intoxicating liquors as a beverage, can impair the validity of any lawful contract.

If this agreement be based on the payment of a tax upon the business of trafficking in intoxicating liquors, we would first say, in the language of the Supreme Court of Ohio, in State vs. Rouch, 47 Ohio State, 485, that it nowhere appears that the plaintiff in error has ever paid the tax.

Further, the payment of a tax on the sale of intoxicating liquors under the laws of Ohio, does not confer any right on the party paying the tax to engage in such business. See Lyle

vs. Sears, 65 O. S., 49, and 5 Wallace, 463 License tax cases; and Fell vs. State, 42 Md., 72. This subject is further considered under the next paragraph of this brief.

Discrimination in Favor of Railroads.

A large part of the brief for the plaintiff in error is taken up with a discussion of the proposition that this Act is nullified by a later Act of the General Assembly of the State of Ohio, which, by the claim of plaintiff in error, extends certain privileges to certain railroad corporations, which privileges are not allowed to any other corporations, nor to natural persons. This, he claims, is a denial to the citizens of the equal protection of the laws. Counsel for plaintiff in error has attached to his brief, as Appendix B, at page 80, the Act in question. The date of the passage of this Act is given as May 12, 1902, and it may be found on page 564, of volume 95, of the Ohio Laws. Upon an examination of this Act, together with the body of the law to which it is supplementary, it will be discovered that this Act is supplementary to what is commonly known as the "Dow Law," which is an Act imposing a tax upon the business of trafficking in intoxicating liquors carried on within the state. This Act imposes a tax, as is provided in Section 1 thereof (amended in volume 92, Ohio Laws, page 34), which Section is printed in Bates Revised Statutes as Section (4364-9). This act being supplementary to Section 4364-9, is simply to provide a rule for the taxing of railroad corporations selling intoxicating liquors upon buffet or dining cars. We are not concerned with the proposition as to whether this Act is based upon a constitutional classification, or whether the Act is valid as a tax measure, but we claim that this Act is an Act levying a tax, and is nothing more, and that it does not confer upon any person, or corporation, the right to engage in any business whatsoever in the state of Ohio. It has been

held that the Dow Law, before referred to, is simply an act imposing a tax, and does not confer any right upon any person to engage in any business.

Adler vs. Whitbeck, 44 O. S., 540.

The Act which is supplementary to this, should receive a like construction. In order to give this Act the force and effect for which plaintiff in error contends, it must be held to confer upon the party paying the tax, a right to sell intoxicating liquors as a beverage. We contend that the Act does not, in its terms, authorize any such construction, but even if this court should be of the opinion that this Act did authorize such a construction, then it would be absolutely void, under the Constitution of Ohio. Section 18 of the Schedule to the Constitution of Ohio, forbids the granting of any license to traffic in intoxicating liquors, and, therefore, if this Act be construed as contended for by the plaintiff in error, it must be held by this court to be void, as being in contravention of that provision.

We therefore deny the correctness of the position of counsel for the plaintiff in error, and insist that the Act referred to grants no special privileges to anyone, and, therefore cannot operate in the manner contended for by plaintiff in error.

CONCLUSION.

The foregoing disposes of all the assignments of error in this case. No other propositions are presented by this record, and in our judgment, the judgment of the Supreme Court of Ohio, sustaining the validity of the Beal Local Option Law should be followed by this court.

Respectfully submitted,

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